



D.C. Criminal Code Reform Commission
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To: Code Revision Advisory Group (Advisory Group)
From: Criminal Code Reform Commission (CCRC)
Date: September 26, 2018
Re: Advisory Group Memorandum #20 Supplemental Materials to the First Drafts of Report #26-29

This memorandum supplements the first drafts of reports #26-29,¹ which provide recommendations for human trafficking, stalking, sexual assault, and failure to make an arrest statutes in the Revised Criminal Code (RCC). The memorandum notes some points about past and future revision work that may be relevant to Advisory Group members' review.

As always, the CCRC welcomes all comments from Advisory Group members. Please bear in mind that there will be a second draft of these draft reports, and changes may be substantial depending on Advisory Group feedback and review of statistical information. Consequently, minor corrections to spelling, formatting, and style in the commentary to these reports may best be held for the second draft or communicated to staff apart from members' formal written comments.

FIRST DRAFT OF REPORT #26, SEXUAL ASSAULT AND RELATED PROVISIONS

Definitions

At this time, the revised sex offenses are drafted as having their own section for definitions, despite overlap with definitions for other offenses against persons (i.e., "coercion.") However, if feasible, the CCRC will recommend identical statutory definitions and commentary entries for terms used in both offenses against persons and property offenses. In addition, for purposes of Report #26, the definitions are limited to the definitions that are specific to the revised sex offenses (e.g., "sexual act."). Definitions for terms like "dangerous weapon" or "vulnerable adult" that have already been discussed in drafts for all offenses against persons (including sex offenses) were excluded.

Model Penal Code Sexual Assault Provisions

In recent years the American Law Institute (ALI) has undertaken a review of the Model Penal Code (MPC) sexual assault offenses. As of September 2018, only three definitions had been approved by the ALI membership—"sexual penetration," "oral sex," and "consent." The commentary in Report #26 references these definitions and a few other relevant draft provisions

¹ First Draft of Report #26, Sexual Assault and Related Provisions; First Draft of Report #27, Human Trafficking and Related Statutes; First Draft of Report #28, Stalking; First Draft of Report #29, Failure to Arrest.

under development by the ALI. The CCRC will continue to monitor the development of the ALI MPC update, and would be happy to share those draft materials with Advisory Group members upon request (most draft provisions also are available on Westlaw).

Dangerous Weapons

The revised sexual assault statute (RCC § 22A-1303) codifies a penalty enhancement for the reckless use or display of a dangerous weapon or imitation dangerous weapon that causes the complainant to engage in or submit to the sexual conduct. This revised penalty enhancement replaces both the current sex offense aggravator for an armed actor in D.C. Code § 22-3020² that applies to all sex offenses, as well as the general “while armed” enhancement in D.C. Code § 22-4502³ that applies to first degree, second degree, and third degree sexual abuse, as well as child sexual abuse as “crimes of violence.”⁴

The revised sexual assault statute (RCC § 22A-1303) is the only revised sex offense with a weapons enhancement. However, other sex offenses may be subject to the future revised offenses of possession of a firearm during a crime of violence (PFCV) or possession of a dangerous weapon during a crime of violence (PDWCV). The CCRC has not yet fully reviewed PFCV or PDWCV and is not prepared to make reform recommendations at this time.

Possible Issues for Subsequent Drafts

One issue which CCRC staff may address in subsequent recommendations is whether to expand liability for some sex offenses to cover causing a person to engage in or submit to contact with semen, without effective consent. The current District sex abuse and related offenses do not appear to provide liability for such conduct generally, although insofar as semen is no different from any other “object” the current definition of “sexual contact” may provide liability when there is contact between semen and specified body parts.⁵ Rather, for fact patterns where it is not a specified body part that makes contact with semen, it appears that under current District law a person would be liable only for an assault charge—whether as a battery⁶ or a non-consensual sexual touching.⁷ The revised criminal code similarly would treat nonconsensual contact with semen not touching a specified body part as an assault-type offense—offensive physical contact (RCC § 22A-1205). However, the current law arguably does not provide adequate punishment for the sexual nature of such contact with semen, e.g., when a person is

² D.C. Code § 22-3020(a)(6).

³ D.C. Code § 22-4502.

⁴ D.C. Code §§ 22-4501(1); 23-1331(4).

⁵ D.C. Code § 22-3001(9) (“‘Sexual contact’ means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

⁶ See, e.g., *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) (“A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant’s statement that he removed the phone from the complainant’s hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts.”)

⁷ The DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching. See, e.g., *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (“Non-violent sexual touching assault . . . is committed by the voluntary touching of another in a sexually sensitive or private area without consent. Sexual touching need only consist of a touching that could offend a person of reasonable sensibility.”) (quotations and citations omitted).

physically assaulted and the perpetrator masturbates on the complainant without otherwise committing what the law defines as a “sexual contact” or “sexual act.”⁸ The CCRC would welcome Advisory Group comments on whether and how future revisions should address this conduct.

FIRST DRAFT OF REPORT #27, HUMAN TRAFFICKING AND RELATED STATUTES

Key Provisions to Note.

First, RCC § 22A-1601 revises the definition of “coercion.” Notably, unlike the current D.C. Code,⁹ the revised “coercion” definition does not include fraud or deception. Causing another person to provide labor or services by means of fraud or deception no longer constitutes forced labor or services, absent some other form of coercion or the use of debt bondage. Obtaining labor or services by means of deception will be treated as a property offense. In part, this change avoids treating various employment disputes as serious felonies.

Second, the RCC codifies a distinct forced commercial sex offense. The current D.C. Code does not include a distinct forced commercial sex offense. It is unclear whether the current forced labor statute (in the human trafficking chapter) criminalizes the use of coercion to cause a person to engage in commercial sex acts. The current forced labor offense requires that the accused “use coercion to cause a person to provide labor or services” or to “keep any person in debt bondage.”¹⁰ However, the current code does not specify whether “labor or “services” include commercial sex acts. A commercial sex act arguably constitutes both “labor” and “services” as currently defined, but there is no relevant D.C. Court of Appeals (DCCA) case law. (Moreover, as discussed below, while there are many offenses in the current D.C. Code regarding force and coercion in prostitution, none solely target forced commercial sex.) This change clarifies the organization and scope of human trafficking laws.

Third, the RCC codifies a new sex trafficking patronage offense. Under current law, patronizing the victim of sex trafficking is not explicitly criminalized, although it is possible that a person who patronizes a victim of sex trafficking could be liable under an accomplice theory, or as a conspirator to a sex trafficking charge.¹¹ However, in cases that do not involve accomplice liability or conspiracy, a person who patronizes the victim of sex trafficking is not criminally liable under current law. This change expands the scope of covered conduct.

Fourth, the revised human trafficking offenses distinguish between trafficking offenses involving labor or services, and offenses involve commercial sex acts. The RCC codifies separate forced labor and services, and forced commercial sex offenses; and separate trafficking in labor or

⁸ See, e.g., Amy Wang, *Man accused of kidnapping woman and masturbating on her is given ‘one pass,’ won’t go to prison*, Washington Post, September 22, 2018, available at:

https://www.washingtonpost.com/nation/2018/09/22/man-accused-kidnapping-masturbating-woman-given-one-pass-wont-go-prison/?utm_term=.3f543a720ee9.

⁹ D.C. Code § 22-1831(3).

¹⁰ D.C. Code § 22-1832.

¹¹ For example, if A assists or encourages B to coerce C into engaging in a commercial sex act with A, and A has the requisite mens rea, A could be prosecuted for forced commercial sex acts under an accomplice theory.

services, and trafficking in commercial sex offenses. This change allows for penalty distinctions between trafficking offense that involve labor or services, and that involve commercial sex.

Replacing Portions of Chapter 27 Offenses

The RCC human trafficking offenses also change current District law by replacing portions of several offenses under current Chapter 27 of the D.C. Code. The current Chapter 27 codifies various prostitution related offenses, including several that criminalize compelling another person to engage in prostitution, or holding, detaining, secreting, or harboring a person for the purposes of prostitution.¹² Each of these statutes criminalizes using some form of threats, intimidation, force, or compulsion to cause another person to engage in a commercial sex act, or detaining, harboring, or secreting a person for the purposes of prostitution. Conduct constituting these offenses overlaps with the revised forced commercial sex and trafficking in commercial sex offenses. However, because the terms “force,” “fraud,” “intimidation,” “threats,” “duress,” or “compel” are not statutorily defined, and it is unclear when compelling a person to engage in a commercial sex act is criminalized under current Chapter 27.

The RCC addresses this ambiguity, and relies on the statutory definitions of “coercion” and “debt bondage” to specify when compelling another person to engage in commercial sex acts, or trafficking a person for the purposes of commercial sex acts constitutes a criminal offense. The revised forced commercial sex statute replaces all of the compelled prostitution offenses under Chapter 27, and uses statutory definitions of coercion and debt bondage to specify when compelling a person to engage in a commercial sex act constitutes a crime. The revised offenses also specify culpable mental states, which are often ambiguous under current Chapter 27 offenses. Criminalizing compelled commercial sex acts under the revised forced commercial sex and trafficking in commercial sex offenses creates a uniform standard for determining when criminal liability applies.

Please note that the revised human trafficking offenses are not intended to change any Chapter 27 offenses, or parts thereof, that do not involve compelling a person to engage in commercial sex acts, or trafficking a person for the purposes of commercial sex acts. Staff has not comprehensively reviewed all Chapter 27 offenses, and remaining prostitution offenses are not scheduled to be revised in the near future.

Definitions

At this time, the revised human trafficking offenses are drafted as having their own section for definitions, despite overlap with definitions for other offenses against persons (i.e., “coercion.”)

¹² D.C. Code § 22-2704 criminalizes “[s]ecreting or harboring any child” who has been “persuaded, enticed, or abducted” “for the purposes of prostitution.” D.C. Code § 22-2705 criminalizes “compel[ing] . . . any individual [t]o engage in prostitution.” D.C. Code § 22-2706 criminalizes “detain[ing] any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact” or “compel[ing] any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact” by means of “threats or duress[.]” D.C. Code § 22-2708 criminalizes using “force, fraud, intimidation, or threats” to “place or leave a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]”

However, if feasible, the CCRC will recommend identical statutory definitions and commentary entries for terms used in both offenses against persons and property offenses.

Possible Issues for Subsequent Drafts

One significant issue which CCRC staff may address in subsequent recommendations is whether any of the human trafficking offenses should categorically qualify as a sex offender “registration offense”¹³ or “lifetime registration offense.”¹⁴ Under current law, no human trafficking offenses or Chapter 27 offenses specifically require sex offender registration.¹⁵ However, some of the revised human trafficking offenses involve conduct that is similar to that criminalized under revised sex offenses and current D.C. Code offenses specifically referenced as sex offender registration offenses. For example, forced commercial sex criminalizes the use of coercion to cause another person to engage in a commercial sex act. Similarly, the RCC’s second degree sexual assault criminalizes causing a person to engage in or submit to a sexual act by means of coercion.¹⁶

FIRST DRAFT OF REPORT #28, STALKING

Key Provisions to Note.

First, the offense is one of a very few exceptions to the general rule that criminal offenses do not punish the infliction of purely emotional harm (absent any accompanying physical harm)¹⁷ and that a negligent culpable mental state as to the primary harm of the offense cannot suffice for an offense carrying felony liability.¹⁸ It does so, in part, to recognize emotional harm as an independent wrong¹⁹ and, in part, to enable law enforcement to intervene before the actor escalates to physical violence.²⁰ The RCC continues to provide liability based on purely

¹³ D.C. Code §22-4001(8).

¹⁴ D.C. Code § 22-4001(6).

¹⁵ Note, however, that the definition of “registration offense” contains a catch-all provision that may apply to some human trafficking crimes. D.C. Code § 22-4001(8)(D) (“Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor, assaulting or threatening another with the intent to engage in a sexual act or sexual contact or with the intent to commit rape, or causing the death of another in the course of, before, or after engaging or attempting to engage in a sexual act or sexual contact or rape;”).

¹⁶ RCC § 22A-1303.

¹⁷ See also, D.C. Code § 22-1101, child cruelty; *Alfaro v. United States*, 859 A.2d 149, 159 (D.C. 2004) (“[T]he infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and “unjustifiable” rather than mild or trivial.”).

¹⁸ See also, D.C. Code § 50–2203.01 negligent homicide. Virtually no current Title 22 misdemeanors require a negligence standard as to the primary harm, either. But see D.C. Code § 22-1102 refusal or neglect of guardian to provide for child under 14 years of age (3 month maximum imprisonment). Negligence is not an unusual culpable mental state for regulatory offenses in the current D.C. Code. See, e.g., D.C. Code § 8-147 (negligent supervision of pesticide application). Of course, the current D.C. Code stalking statute is ordinarily a misdemeanor (maximum imprisonment of 1 year), unless certain aggravating factors are present, in which case it carries a 5 year or 10 year maximum imprisonment penalty. D.C. Code § 22-3134.

¹⁹ See Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607, 639 (2015) (discussing the independent wrong rationale and explaining, “Various studies have documented a link between physical and emotional well-being and have found that emotional stress can lead to physical disease.”).

²⁰ See *id.* at 638 (discussing the prophylactic rationale).

emotional harms that a defendant is negligent about inflicting, although changes to the definitions of these²¹ and other²² elements of the revised stalking offense have the effect of narrowing the scope of covered conduct.

Second, although the District currently treats stalking as an offense against persons, some reform states treat it as a public order violation.²³ The RCC continues to treat the offense as an offense against persons in a new chapter concerning offenses against privacy.

Third, the District's current stalking statute is one of the broadest in the nation, and the statute may be challenged as unconstitutionally overbroad.²⁴ The RCC stalking statute aims to prevent constitutional challenges by amending the current language in three ways: (1) requiring prior notice from the target of the speech to cease non-threatening communications;²⁵ (2) excluding non-threatening communications about, and not to, a person;²⁶ and (3) excluding common examples of protected and otherwise legitimate activity.²⁷

Fourth, the District's current stalking statute applies to "monitoring the victim" by any means, although the term is not defined and has not been interpreted by District courts. The RCC stalking statute does not specifically include "monitoring" other than in-person "physically monitoring," but electronic monitoring and voyeurism will be addressed separately in future CCRC revisions.

Lastly, while the number of annual stalking charges filed in Superior Court is fewer than two dozen, this may be misleading as to the District court system's use of the stalking statute. Allegations of stalking appear to be frequently litigated in the District's Civil Protection Order (CPO) courtrooms. Currently, a victim of stalking qualifies as a petitioner, under D.C. Code § 16-1001(12), and a petitioner has the right to seek relief in CPO court, under D.C. Code § 16-1002. Moreover, it should also be noted that the Council is now considering an amendment to Title 16 that would separate petitions for "anti-stalking orders" between unrelated parties from petitions for civil protection orders between family members.²⁸ A recent legislative hearing highlighted problems in the current way of processing such civil protection orders.²⁹ The CCRC

²¹ For example, the revised offense defines "significant emotional distress" as "substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling."

²² For example, the revised offense limits liability for non-threat communications to instances where the defendant knowingly received prior notice to cease such communication.

²³ Arizona, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Maine, Tennessee, and Texas. See Committee on Public Safety and the Judiciary Report on Bill 18-425 at page 3 (explaining public order offenses give police the power to defuse a situation).

²⁴ The current stalking statute states, "This section does not apply to constitutionally protected activity." D.C. Code 22-3133(b). However, such a savings clause may not be sufficient to prevent a finding of unconstitutional overbreadth. See, e.g., *People v. Relford*, 104 N.E.3d 341 (Ill. 2017) (holding a key provision of the Illinois stalking statute, comparable to the District's language, unconstitutional).

²⁵ RCC § 22A-1801(a)(2)(B). Prior notice to cease is not needed for threatening communications.

²⁶ *Id.*; see also *People v. Relford*, 104 N.E.3d 341 (Ill. 2017) (explaining one-to-one communications affect the right to privacy in ways that communications in a public forum where the victim is a known or intended recipient of the message do not) (citing *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970)).

²⁷ RCC § 22A-1801(e).

²⁸ Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2018, B22-0780, April 10, 2018.

²⁹ Advocates for domestic abuse victims have said that the Domestic Violence Division now spends considerable time and resources settling disputes between unrelated parties. See D.C. Coalition Against Domestic Violence,

will monitor this legislation as to the procedural handling of “anti-stalking” orders, but the more relevant consideration remains the use of the stalking statute in civil protection order proceedings at all. Changes to the scope of the revised stalking statute will affect these proceedings to the extent that the changes in the revised statute narrow the scope of covered conduct.

FIRST DRAFT OF REPORT #29, FAILURE TO MAKE AN ARREST

The District currently criminalizes a police officer’s failure to make an arrest for a violation of District or federal law as a misdemeanor with a maximum penalty of two years imprisonment.³⁰ This law effectively imposes a non-discretionary, zero tolerance enforcement policy any time an officer personally observes a criminal offense, even if that officer is off duty at the time.³¹ The U.S. Department of Justice has criticized this type of “zero tolerance” enforcement strategy in Baltimore, Maryland, linking the practice to racial disparities in law enforcement and damage to community relationships urged police organizations to instead adopt a model with emphasis on building community partnerships.³² In fact, the District’s Metropolitan Police Department’s (MPD) policies discourage, and in some cases disallow, arrests for low-level offenses, in direct contravention of this statute.³³ Even if MPD is required to make arrests for violations of specific crimes, a criminal sanction for noncompliance is not necessarily required.³⁴ The Commission recommends repeal.

Hearing Testimony on B22-0780, at page 3, available at <http://lims.dccouncil.us/Download/40030/B22-0780-HearingRecord1.pdf> (noting an increase in partner-in-common cases and explaining, “The relationship dynamics (or lack thereof) of these cases are not in congruence with the intent of the DV Unit of the court...”); see also The Legal Aid Society of the District of Columbia, *Hearing Testimony on B22-0870*, at pages 1-2, available at <http://lims.dccouncil.us/Download/40030/B22-0780-HearingRecord1.pdf> (explaining that disgruntled landlords sometimes avail themselves of domestic violence court as “household members.”).

³⁰ D.C. Code § 5-115.03.

³¹ See *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997).

³² U.S. Department of Justice Civil Rights Division, *Investigation of the Baltimore Police Department*, August 10, 2016, at pages 42, 65.

³³ See, e.g., Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011.

In cases of minor violations of the law (e.g., violation of District of Columbia Municipal Regulations) and, in the judgment of the member, the circumstances surrounding the incident are such that a verbal warning would best serve the interest of the community, the member may issue such a warning as the proper enforcement action.

NOTE: In more serious or aggravated types of incidents, or those which indicate a serious disregard for the safety or welfare of others, or those in which the member has reasonable grounds to believe that the individual concerned will ignore the warning, the appropriate enforcement action would be an arrest.

See also Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992 (prohibiting an arrest for driving without a permit unless the permit has been expired for more than 90 days); Metropolitan Police Department, Special Order 96-10, July 10, 1996 (“In most circumstances, officers shall not summarily arrest a person who has violated the ‘Failure to Comply’ provision. Only in a situation where the continued refusal [after a warning] creates a flagrant and immediate danger...or interferes with ongoing traffic enforcement activities of the police, may an officer consider a summary arrest.”); Metropolitan Police Department, General Order 502.04, April 24, 2018 (establishing a pre-arrest diversion program to be used by crisis intervention officers).

³⁴ See, e.g., D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply).

